11-1300-6208-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF EDUCATION

In the Matter of the Proposed Rules Governing Elementary School Staff Preparation Time, Minn. Rules Part 3500.1400, subpart 3.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on March 28, 1992, at 8:00 a.m. in the Auditorium of the St. Paul Technical College, 235 Marshall Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 to 14.20 (1990), to hear public comment, determine whether the Board of the Minnesota Department of Education ("the Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Board after initial publication are substantially different from those originally proposed.

Joseph Meyerring, Driver Education Specialist, Minnesota Department of Education, 550 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of the Board at the hearing. The Board's hearing panel consisted of Mr. Meyerring and Richard Mesenburg, Supervisor of Curriculum Research and Development for the Department of Education. Approximately 25 persons attended the hearing. Eighteen persons signed the hearing register. The Administrative Law Judge received eleven agency exhibits and seven public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until April 10, 1992, ten business days following the date of the hearing. Pursuant to Minn. Stat. 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. At the close of business on April 15, 1992, the rulemaking record closed for all purposes. The Administrative Law Judge received approximately 590 written comments and five petitions containing 105 names from interested persons during the comment period. The Board also submitted written comments responding to matters discussed at the hearing. In its written comments, the Board proposed further amendments to

the rules.

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On January 30, 1992, the Board filed the following documents with the Chief Administrative Law Judge:

   (a) the proposed Order for Hearing;

   (b) a copy of the Board's Authorizing Resolution;

   (c) the proposed Notice of Hearing;

   (d) a copy of the proposed rules as certified by the Revisor of Statutes;

   (e) a proposed Statement of Need and Reasonableness; and

   (f) an estimate of the number of persons who were expected to attend the hearing.

2. On February 13, 1992, the Board filed the following documents with the Administrative Law Judge:

(a) a revised Order for Hearing;

(b) a revised Notice of Hearing;

(c) a revised copy of the proposed rules as certified by the Revisor of Statutes;

(d) a revised Statement of Need and Reasonableness;

(e) an estimate of the length of the Board's presentation at the hearing;

(f) the names of staff members who would represent the Board at the hearing; and

(g) the materials received by the Board in response to the Notice of Intent to Solicit Outside Information published in 16 State Reg. 1558 (Dec, 23, 1991).

3. On February 24, 1992, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. Agency Ex. 6. On this date, the Board also mailed the Notice of Hearing to those persons who received additional discretionary notice. Agency Ex. 7.

4. On February 24, 1992, the Notice of Hearing and the proposed rules were published in 16 State Register 1939. Department Ex. 8

5. On March 28, 1992, the Board filed the following documents with the Administrative Law Judge:

(a) a copy of the State Register pages containing the Notice of Hearing and the proposed rules;

(b) an affidavit stating that the Notice of Hearing was mailed on February 24, 1992, to all persons on the Board's mailing list and a certificate that the Board's mailing list was accurate and complete as of that date;

(c) an affidavit stating that additional discretionary notice of the hearing was mailed on February 24, 1992, to all public school superintendents and secondary and elementary principals, and to all persons and associations who were involved in the development of the proposed rules or submitted comments regarding the proposed rules; and

(d) a copy of the Notice of Solicitation of Outside Information publi shed in 16 State Register 1 558 (December 23, 1991) .

6. On April 9, 1992, the Board filed the following documents with the Administrative Law Judge:

(a) a copy of the mailing lists containing the names and addresses of those persons who received required or discretionary notice of this proceeding; and

(b) the names of additional agency personnel who would represent the Department at the hearing.

7. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to April 15, 1992, the date the rulemaking record closed.

8. Minnesota Rules pt. 1400.0600 requires that the documents listed in Findings 5 and 6 above be filed with the Administrative Law Judge at least twenty-five days prior to the date of the hearing. Those documents were in fact filed either on the date of the hearing or after the hearing. Failure to comply strictly with the rules constituted a procedural error. In City of Minneapolis v. Wurtele, 291 N.W. 2d 386, 391 (Minn. 1980), however, the Minnesota Supreme Court noted that "[t]echnical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not ,suffice to overturn governmental action . . . ." See, also Auerbach, Administrative_Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 215 (1979) (in deciding if an error is fatal, one should consider (1) the extent of the deviation, (2) whether the error was inadvertent or intentional, and (3) the extent to which noncompliance disabled people from participating in the rulemaking process). Accord: Report of the Administrative Law Judge in in-re Proposed-Amendments to the rules of the State Board of Animal Health, OAH Docket No. 2-0500-4574-1 (June 28, 1 990) ; but cf Johnson Bros. Wholesale Liquor Company v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980) (a complete failure to comply with the Administrative Procedure Act is not an appropriate instance in which to apply the substantial compliance doctrine and results in an invalid rule). Recently-enacted amendments to the Administrative Procedure Act indicate that the Legislature concurs with the view that a harmless error should not preclude adoption of a proposed rule. See Minn. Laws 1992, Chapter 494, Section I (effective April 21, 1992).

The Board's late filings in this proceeding were, for the most part, prepared on a timely basis but kept in the Board's file rather than the file maintained at the Office of Administrative Hearings. The remainder of the late-filed documents (i.e., the certification that the agency's mailing list was complete and accurate as of the date of mailing and the identification of additional agency personnel who would serve on the Board's panel at the hearing) were prepared on the date of the hearing or after the hearing solely to meet the procedural requirements of this rulemaking proceeding. None of the late-filed documents related to the substantive aspects of the proposed rules. The errors were inadvertent and were corrected after they were brought to the attention of the Board. No member of the public requested an opportunity to review the rulemaking file maintained by the Administrative Law Judge prior to the hearing. No one objected to the late filing of any of

these documents or complained of any prejudice arising from the Board's failure to comply strictly with Minnesota Rules pt. 1400.0600. A large number of persons participated in this rulemaking proceeding, and that participation was vigorous. Under these circumstances, the Administrative Law Judge finds that there was substantial compliance with Minn. Rules pt. 1400.0600, the Board's error was harmless, and the error does not affect the ability of the Board to adopt the proposed rules.

Nature of the Proposed Rules and Statutory Authority

9. The proposed rules would require that the daily preparation time afforded elementary school teachers must be comparable to that provided secondary teachers in the school district within the student contact day. As modified following the hearing, the rules permit such preparation time to be scheduled in one uninterrupted time period or in two uninterrupted time periods during the student contact day. The proposed rules specify that school districts that provide for elementary staff preparation time through the collective bargaining process are exempt from the proposed rules until July 1, 1993. The proposed rules also set forth a procedure under which school districts may seek variances for the 1992-93 school year.

The Board based its authority to promulgate the proposed rules upon Minn. Stat. 121.11, subd. 7 (1990), and Minn. Laws 1991, Chapter 265, Article 9, Section 71. Minn. Stat. 121.11, subd. 7, authorizes the Board to "adopt goals for and exercise general supervision over public schools . . . in the state [and] classify and standardize public elementary and secondary schools . . . ." A recently-adopted amendment to Chapter 121 specifies that, while the Board may amend or repeal any of its existing rules, it may adopt new rules only upon specific authority. Minn. Stat. 121.11, subd. 12 (1991 Supp.). Minn. Laws 1991, Chapter 265, Article 9, Section 71 (hereinafter referred to as "the 1991 session law"), which was enacted into law on June 4, 1991, provides such specific authority in the area of preparation time for elementary school staff:

> By May 1, 1992, the state board of education shall adopt a rule under Minnesota Statutes, chapter 14, establishing preparation time requirements for elementary school staff that are comparable to the preparation time requirements for secondary school staff established in Minnesota Rules, part 3500.3700, subpart 3. In adopting the rule, the state board shall consider the length and structure of the elementary day and, if appropriate, permit preparation time to be scheduled at more than one time during the school day. The rule must be effective for the 1992-1993 school year. The state board shall establish a process and criteria for granting one-year variances from the rile for districts that are unable to comply for the 1992-1993 school year.

The Administrative Law Judge finds that the Board has documented its general statutory authority to promulgate the proposed rules.

Small Business Considerations in Rulemaking

10. Minn. Stat. 14.115, subd. 2 (1990), requires that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. In its Statement of Need and Reasonableness ("SONAR"), the Board stated that the proposed rules would have no impact on small businesses. The proposed rules will only affect school

districts in Minnesota. School districts are local public bodies and are not, by definition, "business entities." The Administrative Law Judge thus finds that the requirements of Minn. Stat. 14.115, subd. 2 (1990), do not apply to these rules since the rules will have no impact on small businesses.

Fiscal Notice

11. Minn. Stat. 14.11, subd. 1 (1990), requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rule. The proposed rules will require expenditures by school districts in excess of $100,000 in either of the two years immediately following adoption, and thus a notice is statutorily required. In its Notice of Hearing, the Board estimated that the aggregate cost to school districts, excluding those which presently meet the preparation time requirement, will be 28.7 million dollars for the 1992-93 school year and 30.1 million dollars for the 1993-94 school year. The Board's cost estimates are based upon a survey conducted with respect to the 1988-89 school year by the Minnesota Education Association (MEA). The Notice of Hearing also notes that a survey conducted by the Board suggested that the costs for each of the next two years might be as high as 34.4 million dollars.

While the differences between the two cost estimates set forth in the Notice of Hearing are substantial, the fiscal notice requirement does not demand absolute precision in the agency estimate. The Board has satisfied its obligation to provide notice that the anticipated expenditures by local public bodies will exceed $100,000 per year. The Administrative Law Judge concludes that the Board has met the fiscal notice requirement of Minn. Stat. 14.11, subd. 1 (1990).

impact on Agricultural Land

12. Minn. Stat. 14.11, subd. 2 (1990), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. .17.80 to 17.84 (1990). Under those statutory provisions, adverse impact is deemed to include acquisition of farmland for a nonagricultural purpose, granting a permit for the nonagricultural use of farmland, the lease of state-owned land for nonagricultural purposes, or granting or loaning state funds for uses incompatible with agriculture. Minn. Stat. 17.81, subd. 2 (1990). Because the proposed rules relate only to school districts and will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. 14.11, subd. 2 (1990), these statutory provisions do not apply.

Outside Information Solicited

13. In formulating these proposed rules, the Board published a notice soliciting outside information in the State Register on December 23, 1991. Agency Exhibit 9. Numerous comments were received in response to the solicitation. Agency Exhibit 10. The Board worked with a task force composed in part of teacher representatives in formulating an earlier version of the proposed rules, and circulated various drafts of the proposed rules and the

SONAR to interested persons and organizations. The Board also discussed the proposed rules at its meetings in December of 1991 and February of 1992. Both of these meetings were open to the public and many interested persons were in attendance.

Substantive Provisions ,

1 4. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Board by an affirmative presentation of fact. The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of the proposed rules. At the hearing, the Board primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Board at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable If it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services , 364 N.W.2d 436, 440 (Minn-App. 1985); Blocker Outdoor Advertising Company v. Minnesota DepArtment of -Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984).

The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen 347 N.W.2d 238, 244 (Minn. 1984).

The teachers and teacher associations submitting comments with respect to the proposed rules frequently criticized them as "unfair." This criticism was directed to the portions of the proposed rules that require "comparable" preparation time, allow two preparation periods, permit the granting of variances, and exempt districts with collective bargaining agreements providing preparation time from compliance with the rule during the first year. Each of these issues will be discussed below. The Administrative Procedure Act does not require that the agency establish the "fairness" of its rule provisions. Certain aspects of fairness may, however, be subsumed within the examination of the "reasonableness" of the rules. See e.g. Manufactured See. e.g., Manufactured HQusing Institute, 347 N.W.2d at 246 (the agency must show that a "reasoned determination" was made in formulating the proposed rule).

15. The MEA, the Minnesota Federation of Teachers (MFT), the Minnesota School Board Association, the Minnesota Alliance for Arts in Education, the Minnesota Association of School Administrators, two State Legislators, more than 40 school administrative officials, and more than 550 teachers provided testimony and/or submitted comments on the proposed rules. A few commentators expressed disbelief that their comments on the proposed rule would have any impact on the outcome of the rulemaking proceeding. For example, one individual suggested that the Administrative Law Judge would not read all of the comments but simply tally them "pro" and "con." The Administrative Law Judge assures those who submitted comments that she has read every comment and considered the information presented in each comment in preparing this Report. Due to the great number of comments filed, however, this Report cannot address every comment submitted and will individually identify only a limited number of the commentators.

Another commentator requested that the Judge acknowledge by return mail that she had in fact read his comments. The Administrative Procedures Act does not contain any requirement that the Judge submit proof to commentators that their comments have been received. In a proceeding such as this, where hundreds of individual comments are received, such proof of receipt would be

unduly expensive and administratively unworkable. The Administrative Law Judge has, however, added the commentator's name to the list of those who will be notified when the Report of the Administrative Law Judge is avai lable

16. This Report is generally limited to a discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. The Administrative Law Judge specifically finds that the need for and reasonableness of any provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Proposed.Rule 1500,1400 - Elementary School Staff

17. The proposed rules would add a new subpart 3 to the existing Board rule relating to Elementary School Staff set forth in part 3500.1400. As modified by the Board in its post-hearing comments, subpart 3 reads in its entirety as follows:

> Preparation time. The daily preparation time for an elementary school teacher must be comparable to that provided secondary teachers in the school district within the student contact day. The preparation time may be scheduled at one uninterrupted time period or two uninterrupted time periods during the school student contact day.
>
> A school district that provides for elementary staff preparation time through the collective bargaining process is exempt from this subpart until July 1, 1993. The state board shall grant a variance from this subpart, for the 1992-1993 school year only, if a school district, by August 1, 1992, submits a written request and provides written documentation sufficient to satisfy the state board that implementation of the rule would impede student learning or restrain the effectiveness of the district's educational program. All school districts must comply with this subpart after June 30, 1993.

The testimony and comments regarding the proposed rules focused upon several distinct issues. Each of these issues will be addressed in the findings which follow.

Need for the Proposed Rules in-General

18. Several commentators, including the Minnesota School Boards Association and the Superintendents of the Northfield and Circle Pines Public

Schools, argued that elementary teachers already receive preparation time comparable to that given secondary teachers when the teacher's entire contract day is taken into consideration, and contended that the proposed rules are not needed. In addition, the Superintendents of the Holdingford and Verdi Public Schools questioned whether there is a need for the preparation time afforded elementary staff to be comparable to that provided secondary teachers due to the nature of their classroom assignments.

A substantial number of school district superintendents and school administrators commenting on the proposed rules, including the Superintendents of the Minnetonka, Circle Pines, International Falls, Holdingford, Aitkin, Glencoe, Gonvick-Trail, Middle River-Lancaster-Greenbush, Frazee-Vergas, Plainview, Pipestone, Prior Lake-Savage, Monticello, and Detroit Lakes Public Schools, a member of the Hibbing School Board, and the Principals and other administrators of elementary schools in Zumbrota, Barnesville, Wabasha-Kellogg, and Mankato, stressed the high costs that will be required to achieve compliance with the proposed rules at a time when school districts are already facing severe budget cuts and implementing austerity measures, and questioned the wisdom of promulgating the proposed rules. Some commentators, including the Elementary Preparation Time Committee in the Hopkins School District, the Superintendents of the Fergus Falls - Rothsay and Monticello Public Schools, and the Holdingford Elementary School Principal, suggested that the proposed rules are likely to result in teacher layoffs, increased class sizes, and/or the hiring of greater numbers of paraprofessionals to "babysit" elementary children during the required preparation times, and thus will have a negative impact on the quality of education. Many comments that were submitted by school administrators suggested that preparation time was a term and condition of employment which is properly the subject of collective bargaining, not rulemaking. The Minnesota Association of School Administrators and several other commentators urged that the implementation of the rule be delayed pending state funding of the additional costs.

In contrast, other commentators, including the MEA, the MFT, Charlie Mahavolich, Kim Koehnen, Carol Durham, and many other teachers, stressed the need for greater elementary school preparation time, indicated that greater preparation time will improve the quality of elementary education, and stated that increased preparation time is long overdue and warranted regardless of cost. Several commentators pointed out that the majority of elementary teachers are female and suggested that the failure of school districts to provide adequate preparation time reflects sex discrimination. Comments filed by elementary school teachers employed in schools throughout the state indicate that they must teach from seven to fourteen subjects a day in such

varied areas as reading, language, spelling, math, science, social studies, health, handwriting, physical education, and computer skills, while secondary teachers generally teach only one or two subjects. The elementary teachers also emphasized their need to have additional time to prepare instructional lessons, grade papers and tests, contact parents, assess the needs of children, prepare individual education plans, become familiar with new teaching areas (such as AIDS education and environmental issues), counsel students, and interact with colleagues. They indicated that they must spend greater amounts of time supervising and assisting elementary students before and after the school day, are expected to provide more individualized instruction and greater remediation and enrichment than secondary teachers, and are required to coordinate with increasing numbers of special needs personnel. The MFT stated that it would grieve or litigate any situation in which districts attempt to use non-licensed staff to provide supervision of students during teachers' preparation periods based upon a contention that such an approach would violate provisions of existing rules and statutes which mandate that licensed professionals teach elementary students during required instructional hours each day.

In its SONAR, the Board indicated that preparation time is needed "[t]o assure quality uniform educational opportunities for all children." In

support of the need for the proposed rules, the Board emphasized the increasing demands being placed on elementary school staff to "become more effective and address additional societal problems," stressed the "continual student contact and in excess of ten different lesson preparations" required of elementary teachers, and pointed out the need for time "to prepare instructional lessons, interact with colleagues, assess the needs of children[,] respond to parental contacts (and] have time for psychological refurbishing." The Board noted that approximately 80 percent of the state's elementary school staff receive some preparation time, and approximately 28 percent of the districts are now in total compliance with the proposed rules. Although many school districts in the state have provided some preparation time for their elementary staff (often by utilizing specialists in such areas as art, music, and physical education), not all districts provide such preparation time. The Board indicated that, even where specialists are utilized, preparation time is reduced because teachers must supervise the students while they are traveling to the specialist's location. The Board further emphasized that the 1991 session law requires promulgation of an elementary staff preparation time rule. SONAR at 2-3.

By virtue of its passage of the 1991 session law, the Minnesota Legislature has determined that preparation time for elementary staff which is "comparable" to that afforded secondary teachers is needed. The session law also mandates promulgation of rules on this topic and compliance with the rules within one year. It is not within the Board's discretion to choose not to promulgate rules on this topic or to delay implementation of such rules. The proposed rules thus have been demonstrated as a general matter to be needed.

Board's interpretation of "Comparable" as "Proportional"

19. A draft of the SONAR which was apparently released to the MEA, the MFT, and various teachers serving on the elementary preparation time task force prior to the Initiation of this rulemaking proceeding stated that the term "comparable" as used in the proposed rules would be defined to mean "equal." The Board indicated in the final draft of its SONAR that it will construe the term "comparable" to mean "proportional":

> It is the opinion of the State Board of Education that the word comparable be interpreted to mean proportional. That is, if the secondary staff have 50 minutes of uninterrupted perparation [sic] time during a 7 112 hour student contact day then the elementary staff would

> receive two uninterrupted equal blocks of preparation time totaling 36 minutes or one uninterupted [sic] block of preparation time totaling 36 minutes during a 5 l/2 hour student contact day. This language requires school districts to provide elementary school staff with uninterrupted preparation time which will meet their needs for preparing instructional lessons, interacting with colleagues, assessing the needs of children, responding to parental contacts, etc.

SONAR at 2. The Minnesota School Board Association, Allen Frazier (Superintendent of the Waconia Schools), Les Sonnabend (Superintendent of the
Prior Lake Schools), and Dale Berglund (Principal of a K-12 school in northern

Minnesota), expressed support of the Board's interpretation of "comparable" to mean "proportional." Several other school superintendents, principals, and administrators who submitted comments indicated that the student contact day of elementary teachers was shorter than that of secondary teachers and stated that this difference should be taken into consideration in determining what amount of preparation time is required for elementary teachers.

The MEA and the vast majority of teachers who commented on the issue urged that the term "comparable" be construed by the Board to require that elementary teachers have preparation time that is equal in length to that afforded secondary teachers. Many elementary teachers commented that they in fact have student contact days that are similar to or longer than those of secondary teachers, and took issue with the Board's apparent suggestion that their student contact days were generally shorter. The MEA argued that the Board's interpretation of "comparable" is not reasonable and conflicts with the intent of the Legislature in enacting the 1991 session law. The MEA recommended that the proposed rules include language which specifies that the daily preparation time afforded elementary teachers must be comparable in total length of time to that afforded secondary teachers, in order to clarify the proper interpretation of the term "comparable." The MEA also contended that the Board's interpretation will lead to confusion and that the mode of calculation provided by the Board during its post-hearing comments conflicted with that set forth in the SONAR. Two members of the State Legislature (Alice Johnson, the chief author of the House bill, and Bob McEachern, Chair of the House Education Committee), submitted letters stating that the term "comparable" was used in the 1991 session law because they recognized that exact equivalence between the preparation time afforded secondary and elementary staff may not be possible. Representatives Johnson and McEachern indicated that they intended that elementary preparation time be as equal to secondary preparation time as possible, given the differences in elementary and secondary school schedules.

"Comparable" is defined as "1. capable of being compared. 2. worthy of comparison. 3. similar or equivalent." American_Heritage Dictionary at 300 (Second College Ed. 1985). "Proportional" means "I. forming a relationship with other parts or qualities; being in proportion. 2. properly related in size or other measurable characteristics." it. at 994. The two terms, comparable and proportional, are similar but not identical. Interpretation of the term "comparable" to mean "proportional" will clearly affect the manner in which the proposed rules are applied. Since those affected by the proposed rules have become aware of the manner in which the Board intends to interpret the term "comparable," they have objected and argued that a different term or clarifying language should be included in the proposed rules to overcome the Board's intended interpretation.

It is a well-settled principle that administrative agencies cannot expand or restrict rights granted by statute. United Hardware Distributing Company v. Commissioner of Reyenue, 284 N.W.2d 820 (Minn. 1979); Holland v. State, 115 N.W.2d 161, 163-64 (Iowa 1962). The 1991 session law establishes a requirement that the preparation time afforded elementary staff be "comparable" to that afforded secondary staff and requires that, in adopting the rule, the Board "consider the length . . . of the elementary day The session law reflects the Legislature's determination that elementary school teachers are entitled to an amount of preparation time "comparable" to that provided secondary teachers. The proposed rules themselves merely echo

the requirement that the daily preparation time for elementary teachers must be comparable to that provided secondary teachers in the school district during the student contact day.

The mere use of the term "comparable" in the proposed rules cannot constitute a defect in the rules under these circumstances. The term was used in the 1991 session law, and the board's use of the same term in its proposed rules cannot properly be viewed as unnecessary or unreasonable. A rulemaking proceeding does not provide an appropriate forum in which to challenge an agency's indication in its SONAR of the manner in which it proposes to interpret a rule provision. It simply is not within the jurisdiction of the Administrative Law Judge during this rulemaking proceeding to assess the propriety of the Board's intention to interpret "comparable" as "proportional" for the purpose of determining whether school districts have met the requirements of the 1991 session law and the proposed rules The propriety of the Board's interpretation may, of course, be challenged by the regulated public in litigation or be the subject of future legislation.

The term "comparable" was used in the 1991 session law to describe the preparation time to be required by Board rule. The Administrative Law Judge finds that the need for and reasonableness of the term "comparable" in the proposed rules has been demonstrated by virtue of its use in the legislation mandating the rules. The use of that term is statutorily authorized and does not constitute a defect in the proposed rules.

Calculation of Preparation Time Rd Time Period During Which Preparation Time must be Provided

20. As originally proposed, the first paragraph of the rules stated that "[t]he daily preparation time for an elementary school teacher must be comparable to that provided secondary teachers in the school district within the student contact day. The preparation time may be scheduled at one uninterrupted time period or two uninterrupted time periods during the school day." At the public hearing and in comments following the hearing, several suggestions were made to modify this portion of the proposed rules. Each of these suggestions will be discussed in the following paragraphs.

21. The MEA and numerous teachers urged that the second sentence of the proposed rules be revised to clarify that preparation time must be provided during the "student contact day" rather than the "school day." "Student contact day" is not defined in the Board's current rules. As explained at the hearing, the student contact day encompasses the time spent by teachers in contact with students between the start of classes and the end of classes each day. The entire contract day of elementary teachers typically includes time periods both before and after the "student contact day." The MEA and the

teachers argued that a requirement that preparation time be provided during the student contact day would be consistent with the terminology used in the first sentence of the proposed rules, the legislative intent underlying the 1991 session law, and the preparation time currently afforded secondary teachers. Elementary and secondary teachers who are already afforded uninterrupted preparation time during the student contact day indicated that such time has been very valuable in improving the quality of their preparation and has enhanced the quality of the education provided to their students. Numerous elementary school teachers who testified at the hearing and provided post-hearing comments stated that their time before and after the student

contact day is not productive preparation time because it is interrupted by students who require supervision or assistance, staff meetings, telephone conversations with parents, coordination with other staff, and other work duties. The MEA also recommended that the proposed rules be revised to require that the daily preparation time for elementary school teachers be comparable to that "required for secondary teachers in the school district under Minnesota Rules, part 3500.3700, sub-part 3," rather than merely requiring that such time be comparable to that "provided for secondary teachers in the school district."

During the hearing and in its post-hearing comments, the Board stated that it had intended that the proposed rules require the provision of comparable preparation during the student contact day and indicated that such language had been inadvertently deleted. The Board agreed that, in accordance with the suggestion of the MEA and elementary teachers, the second sentence of the proposed rules should be revised to refer to "student contact day." The Board thus altered the second full sentence of the proposed rule to read as follows: "The preparation time may be scheduled at one uninterrupted time period or two uninterrupted time periods during the school student contact day." In making only this revision to the proposed rules, the Board apparently has declined to make the further revision suggested by the MEA.

In addition, the Board apparently has rejected suggestions made by the Minnesota School Boards Association and several school superintendents and other school administrators (including Rosemount, Northfield, Barnesville, Lynd, Minnetonka, Holdingford, Frazee-Vergas, LaPorte, Norwood, Little Falls, Austin, and McGregor Public Schools personnel) that the proposed rules should be revised to (1) require that the preparation time afforded elementary teachers during their entire Contract day must be comparable to that afforded secondary teachers, or (2) require that the preparation time afforded elementary teachers on a weekly basis must be comparable to that afforded secondary teachers. These school administrators argued that any time in the work day during which teachers are not responsible for teaching their students is properly deemed preparation time and contended that, if time before and after the "student contact day" is included in evaluating the preparation time currently afforded elementary teachers, their total daily preparation time would be similar to or exceed that afforded secondary teachers. They also indicated that, because the preparation time provided elementary teachers varies from day to day depending upon the scheduling of specialists' classes, the proposed rules should provide school districts greater flexibility and permit them to compare the preparation time provided elementary and secondary teachers on a weekly basis.

The 1991 session law requires that the Board adopt a rule "establishing preparation time requirements for elementary school staff that are comparable

to the preparation time requirements for secondary school staff established in Minnesota Rules, part 3500.3700, subpart 3." Minnesota Rules part 3500.3700, subpart 3, provides: "The maximum assignment of subjects for any secondary school teacher shall be five periods in a six-period day or six periods in a seven- or eight-period day. Each teacher shall have one period during the school day for preparation and conferences." That rule clearly requires that secondary teachers be afforded preparation time during the student contact day. Therefore, the language of the proposed rule requiring that elementary teachers receive preparation time during the student contact day comparable to that provided secondary teachers is consistent with the 1991 session law and

the Board's existing secondary preparation time rule to which the session law refers. The failure of the proposed rules to refer to Minn Rules pt. 3500.3700, subp. 3, does not render them unneccesary or unreasonable. School districts in the state are subject to that rule already, and it is expected that they have obtained compliance with that rule in the provision of preparation time to secondary teachers.

22. The MEA and substantial numbers of teachers suggested that the time at the beginning and end of preparation periods which is spent transporting students to and from specialists should be expressly excluded from preparation time. The Board panel indicated at the hearing that it does not consider transportation time to be preparation time within the meaning of the rule. The MEA suggested that the proposed rules be revised to specify that preparation time "shall not include time needed to transport students from one class to another." In its post-hearing comments, the Board did not modify the proposed rules in this regard. The failure of the Board to modify the proposed rules as suggested by the MEA does not render the proposed rules defective. The Administrative Law Judge does, however, urge the Board to consider revising the proposed rules in the manner suggested by the MEA in order to clarify the proposed rules and provide notice to school districts of the manner in which the Board intends to interpret the preparation time requirement.

23. Finally, many commentators objected to the provision in the proposed rules which allows preparation time to be divided into two periods. Numerous teachers submitted comments urging that school districts be required to provide preparation time in one uninterrupted block of time in order to provide adequate time in which to start and finish tasks and preclude districts from dividing the total preparation time into brief segments of questionable utility. Several teachers, including Judy Schaubach, a classroom teacher who is serving a term as Vice President of the MEA, disputed whether two blocks of time could ever be "comparable" to the single, uninterrupted block of time presently enjoyed by secondary school teachers. The MEA and MFT representatives contended that the Board has failed to establish the reasonableness of creating a blanket rule allowing all school districts to divide the total preparation time into two periods. The MEA suggested that the proposed rules be revised to require that school districts obtain a variance in order to schedule preparation time in two blocks of time. A few other commentators recommended that the proposed rules permit school districts to divide preparation time into three or more periods.

The SONAR does not set forth the Board's reasons for permitting preparation time to be divided into either one block of time or two blocks of time. In response to questions from interested persons at the hearing, however, the members of the agency panel explained the Board's reasons for permitting two time blocks. The Board determined that it is appropriate for school districts to choose to provide preparation time in two time blocks because such an approach affords school districts some flexibility in complying with the proposed rules and reduces the extremely high costs that will otherwise be associated with the rule. Testimony at the hearing demonstrated that the secondary school day is generally divided into a set number of fairly lengthy scheduled periods, each of which is taught by a different teacher. Elementary school subjects are typically taught by a single teacher in shorter blocks of time, with occasional breaks for specialized instruction in such areas as art, music, or physical education.

Thus, an elementary teacher's schedule may not readily be conducive to a single block of preparation time which is of adequate length.

The 1991 session law expressly requires that, "[i]n adopting the rule, the state board shall consider the length and structure of the elementary day and, if appropriate, permit preparation time to be scheduled at more than one time during the school day." Minn. Laws 1991, Chapter 265, Article 9, Section 71. Given the differences in structure between the secondary school day and the elementary school day, the Board determined that it is appropriate to permit preparation time for elementary teachers to be scheduled in no more than two blocks. Based upon the hearing record, it is evident that school districts not presently providing elementary preparation time of sufficient length to meet the rule requirements will have to rearrange schedules in order to achieve compliance, and that such changes will be costly. The schedule changes and costs necessitated by the proposed rules will be reduced if school districts are permitted to provide preparation time in two blocks of time and, if possible, adjust schedules to use existing personnel to "cover" for teachers who are in a preparation time period. The Board has demonstrated that the provision of preparation time in one or two blocks is needed and reasonable in order to permit administrative flexibility, reduce the costs associated with the proposed rules, and thereby reduce the impact of introducing mandated preparation time into the elementary school schedule.

24. The SONAR suggests that the Board will interpret the proposed rules to require that total preparation time may only be divided into two equal periods. SONAR at 3. This restriction is not, however, included in the express language of the proposed rules. It is conceivable that preparation time might be divided into one fairly lengthy period and a second, very brief, period, and thereby undermine the underlying purposes to be achieved by the 1991 session law and proposed rules. While the Board's failure to specify in the proposed rules that preparation time must, if divided, be divided into two equal periods does not render the rules defective, the Administrative Law Judge urges the Board to revise the proposed rules to so specify. Such a revision would merely clarify the Board's intent in this regard (which was already made clear in the SONAR) and would not constitute a substantial change from the rules as originally proposed.

25. Where preparation time is divided into two blocks of time, the proposed rules are silent regarding whether each block of time must reach at least a certain threshold. Although several commentators suggested that a minimum block of at least 25 or 30 minutes was required in order for preparation time to be useful, other commentators mentioned that as little as ten minutes might be sufficient to correct a set of papers or engage in other brief tasks. The record does not contain sufficient information to enable the Administrative Law Judge to determine what, if any, block of time should be deemed the minimum amount of time appropriate for preparation. The Administrative Law Judge thus does not find that the proposed rules are

defective due to their failure to identify a minimal appropriate block of time.

26. The Administrative Law Judge thus finds that the language of the first paragraph of the proposed rules, as modified by the Board in its post-hearing comments, has been demonstrated to be needed and reasonable. The modification made in the language of the proposed rules clarifies the period within which preparation time must be provided, renders the second full sentence of the proposed rules consistent with the first, and is consistent

with the intent of the Legislature. The new language is needed and reasonable, and does not constitute a substantial change from the language as originally proposed.

Collective Bargaining Exemption

27. The first sentence of the second paragraph of the proposed rules states that "[a] school district that provides for elementary staff preparation time through the collective bargaining process is exempt from this subpart until July 1, 1993." The SONAR reiterates that the proposed rule "provides school districts with an automatic exemption from the rule until July 1, 1993 if they currently provide for elementary staff preparation time" and asserts that "[t]his is reasonable in that districts will not have to change the collective bargaining agreement which is currently in effect . . . ." SONAR at 3. In response to questions from MEA Staff Attorney Harley Ogata at the hearing, the agency panel indicated that the exemption was included in the proposed rules based upon the recommendation of the Minnesota Attorney General's Office that the Board not do anything to modify existing collective bargaining agreements.

The exemption provision was supported by the Minnesota Association of School Administrators and several school superintendents and principals. The MFT, the MEA, and numerous teachers objected to the provision. The MFT characterized the exemption as "unfair" and "educationally unsound," and argued that it did not make sense to make the benefits of the proposed rules available to teachers who failed to negotiate any preparation time while denying the benefits of the proposed rules to teachers who negotiated a lesser amount of preparation time than required by the rules. The MEA contends that the Board failed to establish the reasonableness of the automatic exemption for districts that have some form of elementary preparation time in their collective bargaining agreements. It emphasized that, "[i]f anything, districts that have no elementary prep time in the collective bargaining agreement would have a harder time implementing this rule than those that at least have some." MEA Post-Hearing Comments at 5. The MEA argued that the exemption exceeds the Board's statutory authority, is arbitrary and capricious, and should be deleted from the proposed rules.

The 1991 session law requires that the Board "establish a process and criteria for granting one-year variances from the rule for districts that are unable to comply for the 1992-1993 school year." The Board candidly admitted at the hearing that it did not rely on a "hardship" rationale to support the exemption provision but included the exemption in the proposed rules solely upon the advice of the Minnesota Attorney General's Office that the proposed

rules should not change collective bargaining agreements that were already in effect. The Board did not provide any further evidence supporting the need for or reasonableness of this provision.

The Administrative Procedure Act requires, inter alia, that agencies make "an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule" at the public hearing. Minn. Stat. 14.14, subd. 2 (1990). The agency is permitted to rely upon facts presented by others during the rulemaking proceeding as support for the proposed rule. Id. The Act further requires that the Administrative Law Judge take "notice of the degree to which the agency has . . . demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of

facts." Minn. Stat. 14.50 (1990). In order to demonstrate the need for a proposed rule, the agency must make a presentation of facts that shows the existence of a problem requiring some administrative attention. See e.g. Report of the Hearing Examiner, In re Proposed Adoption of Rules Relating to the Control of Emissions of Hydrocarbons, OAH File No. PCA 79-0008-MG. In order to demonstrate the reasonableness of a proposed rule, the agency must show the existence of some rational connection between the problem and the proposed solution. Id. ; See also Broen Memorail Home v. Minnesota Department of Human Services 364 N.W. 2d 436, 440 (Minn. Ct. App. 1985); Bloocher Outdoor Advertising Co v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984).

The Administrative Law Judge has concluded that the Board has not demonstrated the need for and reasonableness of the proposed collective bargaining exemption. While the 1991 session law does permit the Board to grant one-year variances, it expressly requires that the award of such variances be predicated on a district's inability to comply with the proposed rules. Neither the Board nor any other interested persons supplied an adequate factual basis to support the conclusion that school districts with collective bargaining agreements containing preparation time provisions will be unable to comply with the proposed rules during the 1992-93 school year and thus are deserving of an automatic exemption. It is clear that the Legislature and executive agencies exercising authority delegated by the Legislature may adopt laws and rules that have the effect of voiding contractual provisions between private parties. Sy,, tog., 8 Dunnell Minn. Digest, Contracts 3.09 (4th ed. 1990) ("[i]f a party agrees to do a thing that is lawful and it later becomes unlawful by an act of the legislature, the act avoids the agreement"); Minnesota Gas Co. v., Public Servive Commission, 523 F.2d 581, 583 (8th Cir. 1975), art. denied, 424 U.S. 915 (1976) ("private parties cannot by contract insulate themselves from state rate regulations adopted thereafter"). Moreover, there was no demonstration that the implementation of the proposed rule in such districts would "impede student learning or restrain the effectiveness of the district's educational program" within the parameters of the variance provisions of the proposed rules

(discussed in Finding No. 28 below). Under these circumstances, the Board simply has not made an adequate affirmative presentation of fact to support the need for and reasonableness of this exemption. This defect precludes promulgation of the first sentence of the second paragraph of subpart 3 as part of this rulemaking proceeding. The only way in which this defect may be remedied would be to issue a new notice of hearing and hold a new rules hearing. Therefore, if the Board wishes to adopt the remainder of the proposed rules at this time, it must delete the first sentence of the second paragraph of the rules.

Variances

28. The second sentence of the second paragraph of the proposed rules reads as follows:

> The state board shall grant a variance from this subpart, for the 1992-1993 school year only, if a school district, by August 1, 1992, submits a written request and provides written documentation sufficient to satisfy the state board that implementation of the rule would impede student learning or restrain the effectiveness of the district's

educational program. All school districts must comply with this subpart after June 30, 1993.

One commentator objected to the procedure which has generally been followed by the Board in the past in processing variance requests. The basis for the objection was unclear, and no specific revisions to the proposed rules were recommended. No one objected to the criteria set forth in the proposed rules for the granting of a variance. As discussed in Finding No. 27, the 1991 session law requires the Board to promulgate rules setting forth a process and criteria under which school districts may obtain a one-year variance from the provisions of the proposed rules. The Board has shown that the variance provision is needed and reasonable.

Notice of Rule Changes

29. The MEA and MFT objected to the manner in which the language of the rule and the SONAR was changed prior to the initiation of this rulemaking proceeding. Both groups have substantial memberships and their members will be directly affected by the proposed rule. Both groups also have worked closely with the Board in formulating the proposed rules. According to the MFT, the language of the proposed rules changed three times after the task force participating in the Board's formulation of this rule arrived at its recommended version. The interested groups working with the Board also allege that they were not advised of the changes that were made in the proposed rules and the SONAR prior to the publication of the final proposed rules in the State Register and their receipt of the revised SONAR.

The Administrative Law Judge is sympathetic to the complaints of these groups. They have invested a great deal of time and effort in the formulation of the proposed rules and ideally should have have received specific notice of the changes. However, the Board is faced with a legislative deadline of adopting the rules in time to be effective for the 1992-1993 school year. Fast-approaching deadlines frequently require that agencies abbreviate the procedures they would follow if they had the luxury of more time. The Board's apparent decision to revise the proposed rules and the SONAR without prior consultation with the task force or teacher associations did not deny any affected group adequate notice of the provisions of the proposed rules or SONAR, interfere with their ability to provide comments on the proposed rules during the rulemaking proceeding, or violate any specific statutory obligation or prohibition.

30. The Minnesota Alliance for Arts in Education, Natasha Poppe, Kathleen Sweeney, and several other elementary specialists suggested that the proposed rules include language which makes it clear that specialists, like

other elementary teachers, are entitled to preparation time. At the hearing, the Board panel indicated that, in its view, part-time specialists are covered by the requirements of the proposed rules. The Board did not suggest that additional language be added to the proposed rules to clarify the inclusion of specialists. The proposed rules refer generally to "elementary school teachers." An existing Board rule discusses the recommended pupil-teacher ratio "for music teachers including music specialists" and thus provides some evidence of the Board's inclusion of elementary specialists within the broader reference to elementary teachers. The proposed rules are not rendered

defective by the Board's f ailure to adopt additional language clarifying that specialists are also to be afforded preparation time under the proposed rules. The Administrative Law Judge does, however, urge the Board to consider revising the proposed rules to specify that the reference to elementary school teacher includes specialists in music, art, physical education, science, and other appropriate subject areas. Such a modification would be needed and reasonable to clarify the Board's interpretation and would not constitute a substantial change from the rules as originally proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Education ("the Board") gave proper notice of this rulemaking hearing.

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, la, and 2 (1990), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1990).

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii) (1990), except as indicated at Finding 27.

5. The additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3 (1990), and Minn. Rules pt. 1400.1000, subp. 1, and 1400.1100 (1991).

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusion 4 as noted at Finding 27.

7. Due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3 (1990).

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the

Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substartial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 7th day of May, 1992.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape recorded (no transcript prepared).